

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| Lowell N. Payne, Jr., | : | |
| Plaintiff | : | Civil Action 2:09-cv-1101 |
| v. | : | Judge Smith |
| Cynthia Mausser, <i>et al.</i> , | : | Magistrate Judge Abel |
| Defendants | : | |

ORDER

Plaintiff Lowell N. Payne, Sr., an Ohio prisoner, has filed a complaint alleging that without lawful authority defendants held a hearing to determine his release date from prison. This matter is before the Court on plaintiff Lowell N. Payne, Jr.'s February 9, 2010 objection and motion for relief from the Report and Recommendation of the Magistrate Judge (doc. 12).

Upon *de novo* review in accordance with the provisions of 28 U.S.C. §636(b)(1)(B), the Court **ADOPTS** the Report and Recommendation and **OVERRULES** plaintiff's objections.

In his February 1, 2010 Report and Recommendation, the Magistrate Judge concluded that plaintiff had neither paid the Court's \$350 filing fee or moved to proceed *in forma pauperis*. A December 7, 2009 Deficiency Order gave Payne 30 days to either pay the \$350 filing fee or fill out and execute an Application and Affidavit by An

Incarcerated Person to Proceed Without Prepayment of Fees and costs and submit it together with the cashier's statement of his inmate funds. When he failed to do so, the Magistrate Judge recommended that this lawsuit be dismissed for failure to prosecute. *McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6th Cir. 1997).

Plaintiff argues that the Magistrate Judge does not have jurisdiction to render a decision on this matter because he did not file for post trial relief, has never been convicted of a crime, and is not challenging the conditions of confinement. Plaintiff objects to being characterized as an “Ohio prisoner” and maintains that no substantive state or federal law affirms that he is a prisoner. Payne further argues that he is not an incarcerated person and is not confined by a competent legal authority.

Plaintiff’s argument that he has not been convicted of a crime specious. He is incarcerated at the Chillicothe Correctional Institution. The Ohio Department of Rehabilitation and Correction website indicates that Payne was convicted in 1988 in the Court of Common Pleas for Montgomery County, Ohio of rape. He is serving an indefinite sentence of 10 years to life. Under 28 U.S.C. § 1915(a) any “prisoner seeking to bring a civil action” must either pay the \$350 filing fee or move to proceed in forma pauperis, providing the court with a certified copy of his inmate trust fund account for the previous six months.

Accordingly, Lowell N. Payne, Jr.’s February 9, 2010 objection and motion for relief from the Report and Recommendation of the Magistrate Judge (doc. 12) are OVERRULED. This action is hereby DISMISSED.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE

UNITED STATES DISTRICT COURT